Court Rules Title Insurer Must Defend Trespass Suit

by

James Bruce Davis, Esq.
Bean, Kinney & Korman, P.C.
2000 N. 14th Street, Ste. 100
Arlington, VA 22201
(703) 525-4000; (703) 525-2207 (fax)
bdavis@beankinney.com

A federal court of appeals ruled that a title insurance company must defend an insured owner against a claim that the insured trespassed on the true owner's property. Chicago Title Insurance Company v. 100 Investment Limited Partnership, 2004 U.S. App. LEXIS 920 (4th Cir., January 22, 2004). Surprisingly, the court appears to have based its decision partially on an obvious blunder in reading the policy's insuring provisions.

Chicago Title issued the policy in 1986 for a 300-acre tract that 100 Investment Limited Partnership assembled in Howard County, Maryland. Unfortunately for 100 Investment, the title to a 1.145 acre parcel in the assemblage was defective. The grantors of the 1.145 acre parcel, sisters-in-law named Miller, had previously conveyed the parcel to one Kahn.

100 Investment subdivided the 300 acres and sold off lots to home builders. The 1.145 acre parcel was included in a 1995 conveyance from 100 Investment to NVR Homes. 100 Investment conveyed the property by special warranty deed. Under Maryland law, a special warranty deed limits the grantor's warranty liability to title defects of the grantor's own creation. The title defect in this case arose prior to 100 Investment's acquisition of the property.

The title defect was discovered in 2001, six years after 100 Investment sold the property to NVR Homes. Although 100 Investment had no warranty liability for the title defect, 100 Investment nevertheless undertook to remedy the problem. The remedy was to purchase the 1.145 acre tract from Kahn's successor at a cost of $175,000.

But 100 Investment had not seen the last of the title problem. In March, 2002, Kahn sued 100 Investment for damages. The suit claimed that 100 Investment had trespassed on the 1.145 acre parcel while Kahn owned the parcel.

100 Investment demanded indemnity from Chicago Title for the $175,000 paid to acquire the 1.145 acre parcel. In addition, 100 Investment tendered the defense of Kahn's trespass suit to Chicago Title. Chicago Title refused the demand and the tender, being of the opinion that the company's policy obligations terminated when 100 Investment transferred the property by special warranty deed. Chicago Title then sued 100 Investment for a declaratory judgment that Chicago Title's coverage decisions were correct.

The United States District Court ruled against Chicago Title. The court awarded judgment to 100 Investment for the $175,000 paid to remedy the title problem plus $64,123.29 in

legal fees incurred to defend the trespass suit. Chicago Title appealed.

The Court of Appeals reversed the $175,000 judgment. The court reasoned that after 100 Investment conveyed the property to NVR Homes, 100 Investment had no further risk of loss or liability as a result of the title defect. When the risk ceased, so did the insurance coverage.

However, the court upheld 100 Investment's $64,123.29 judgment for legal fees. In reaching this result, the court rejected Chicago Title's argument that the company's policy obligations terminated in 1995, when 100 Investment conveyed the property to NVR Homes. Although Kahn did not file the trespass suit until 2002, the court ruled that Chicago Title had a duty to defend the trespass litigation because the alleged trespass occurred while the policy was in effect. The court explained:

> There is no language in the policy identifying it as a "claims-made" policy, covering an insured only for claims that are asserted during the policy period. To the contrary, the language of the policy does not refer to claims, but rather to loss or damage. The insuring language provides that Chicago Title "insures, as of [December 18, 1986], against *loss or damage* ... which [100 Investment] may become obligated to pay hereunder" (emphasis added). The policy, rather than providing insurance for any "claim" asserted during the policy period, provides that it covers any "loss or damage" during the policy period.…

Slip. op. at 16.

In the author's opinion, the court erred in holding that Chicago Title liable for defending 100 Investment in Kahn's trespass suit. The insuring provision quoted by the court is a standard provision of the 1970 American Land Title Association form of owner's policy. The policy form covers "attorney's fees and expenses which the Company may become obligated to pay hereunder." "Company" meant Chicago Title, but the court erroneously read the word "Company" as meaning 100 Investment.

It seems clear that the trespass suit caused 100 Investment no loss or damage during the policy period because the suit was not filed until six years after the policy period expired. However, it would be fair to say that 100 Investment's potential liability for trespass accrued during the policy period. In any event, the court seems to have assumed, without explanation, that Chicago Title would be liable for any damages sustained by 100 Investment if it were held liable for trespass.

That assumption is highly questionable. Unlike liability insurance policies, title insurance policies do not insure against damages that the insured may become legally obligated to pay. Instead, title insurance policies insure against diminution in property value resulting from unreported title defects. Under the familiar "four corners" rule, an insurance company has no duty to defend its insured in litigation unless a judgment against the insured would give rise to a duty under the policy to provide indemnity. If Chicago Title had no duty to indemnify 100 Investment for liability resulting from the alleged trespass, Chicago Title had no obligation to defend the trespass suit. In this author's opinion, the court got it wrong.

*James Bruce Davis is a shareholder at Bean, Kinney, & Korman, P.C. of Arlington, Virginia. His practice focuses on title insurance claims and coverage litigation.